

U.S. v. Mallory

1173

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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:
UNITED STATES OF AMERICA, : Criminal Action No.
: 1:17-CR-154
versus :
:
KEVIN PATRICK MALLORY, : June 7, 2018 - P.M.
:
Defendant. : Volume VII of VIII
-----x

The above-entitled Jury Trial was continued
before the Honorable T.S. Ellis, III, United States District
Judge.

A P P E A R A N C E S

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Tonia M. Harris OCR-USDC/EDVA 703-646-1438

EASTERN DISTRICT OF VIRGINIA

U.S. v. Mallory

1174

TABLE OF CONTENTS

MISCELLANY

Preliminary matters.....	1175
Jury Instructions.....	1180
Jury Question.....	1225
Certificate of Court Reporter.....	1232

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

P R O C E E D I N G S

A F T E R N O O N S E S S I O N

(Court proceedings commenced at 1:30)

(Jury not present and the jury instructions conference continued.)

THE COURT: Is there any reason, though, why Ms. Gellie is not here?

MR. GIBBS: She was just behind us, Your Honor.

THE COURT: I'll wait until she arrives.

MR. GIBBS: Okay. Thank you.

THE COURT: Now, let me tell you while we're waiting for Ms. Gellie. The jury has requested permission to deliberate in the conference room back there. That request was denied. So they made a subsequent request to deliberate in the lunchroom area. That's going to be granted.

The reason is, I don't know if any of you have had the occasion to see the jury room here, but it's small. And you -- you're essentially up against the wall and very close to the next person. And I understand their desire to have more room and I understand their desire, especially if they're going to be looking at documents and the like.

I'm also going to send back to the jury the physical exhibits, namely, the telephone and the chip. I don't think there's any objection to that, is there?

MR. KAMENS: No objection.

U.S. v. Mallory

1176

1 THE COURT: I don't think they're going to do
2 anything with it. But what is it that you want me to caution
3 them about it?

4 MR. GIBBS: Well, Your Honor, I think if the phone
5 goes back, the one concern would be if it were powered up, so
6 if the battery could be taken out.

7 THE COURT: Why don't I do it this way. Why don't I
8 tell them that the telephone and the chip are available. If
9 they want them, I'll provide it. And at that time we can
10 consider whether to remove the battery or not or I'll simply
11 tell them don't turn the thing on.

12 MR. GIBBS: That will be fine, Judge.

13 THE COURT: I think that's the better way to do it.
14 Any objection to that, Mr. Kamens?

15 MR. KAMENS: No objection.

16 THE COURT: All right. Now, let's see, I have
17 changed the verdict form, Mr. Kamens, to accommodate your
18 requests, or at least I have had the Government do it and
19 provide me with a copy.

20 Do you have another copy there, Ms. Gellie, of the
21 verdict form?

22 MS. GELLIE: I do not, Your Honor.

23 THE COURT: All right. Let me show the verdict form
24 to Mr. Kamens and see if I -- if that --

25 MR. GIBBS: We did find one, Judge.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1177

1 THE COURT: You did. Hand it to Mr. Kamens.

2 Does that adequately address the issue that you
3 raised?

4 MR. KAMENS: It does, Your Honor. Your Honor, can I
5 have a moment to confer with counsel?

6 THE COURT: Yes, you may.

7 (A pause in the proceedings.)

8 MR. KAMENS: Your Honor, can I mention one issue I
9 just saw and it's not a particularly big issue. I conferred
10 with counsel for the Government. One of the instructions here
11 says, "Character Evidence - Reputation of the Defendant."

12 THE COURT: Is that at the caption?

13 MR. KAMENS: Yes.

14 THE COURT: Well, I don't read captions.

15 MR. KAMENS: Well, it also has that, "The defendant
16 has offered evidence of his good general reputation..."

17 And just as a point of clarity, we had an opinion --

18 THE COURT: Just a moment. What page number are you
19 on?

20 MR. KAMENS: Twenty-one, Your Honor.

21 THE COURT: I beg your pardon.

22 MR. KAMENS: Twenty-one.

23 THE COURT: Just a moment. Let me look at it. I
24 changed it on --

25 (A pause in the proceedings.)

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1178

1 THE COURT: All right. It isn't reputation
2 evidence.

3 MR. KAMENS: Correct.

4 THE COURT: So it ought to read, "has offered
5 evidence of a character trait..."

6 MR. KAMENS: Correct.

7 THE COURT: "A risk-taking." Would that be correct?

8 MR. KAMENS: Yes. And "patriotism."

9 THE COURT: Yes. How about "has offered opinion
10 evidence"?

11 MR. KAMENS: Yes, Your Honor.

12 THE COURT: "Of his patriotism and a character trait
13 of risk-taking."

14 MR. KAMENS: That's fine, Your Honor.

15 THE COURT: Mr. Gibbs.

16 MR. GIBBS: That's fine, Judge. And I would just
17 note in the next paragraph. I guess it should read, "evidence
18 of this opinion evidence..." Or it repeats the reputation
19 language.

20 THE COURT: Yeah, it should get out -- "Evidence of
21 a defendant's" -- why don't we just say, "evidence
22 inconsistent with those -- those traits of character..."?
23 Leave out, "of a defendants."

24 MR. GIBBS: No objection.

25 MR. KAMENS: No objection. That's fine, Your Honor.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1179

1 THE COURT: And then the last sentence has to
2 change. "Unlikely that a person..." why not say, "improbable
3 or unlikely that a person..."

4 MR. KAMENS: "Of patriotic character," Your Honor?

5 THE COURT: Any objection to that?

6 MR. GIBBS: No, Your Honor. I believe that was the
7 testimony.

8 (A pause in the proceedings.)

9 THE COURT: No, I don't think that captures it.
10 Just a minute.

11 (A pause in the proceedings.)

12 THE COURT: How about, "that a person who is a
13 patriotic citizen" because that's what the evidence was?

14 MR. KAMENS: That's fine.

15 THE COURT: "Who is a patriotic citizen would commit
16 such a crime or crimes."

17 Any objection?

18 MR. GIBBS: No, Your Honor.

19 THE COURT: All right. Are we ready to go?

20 MR. GIBBS: One last point on the question about the
21 exhibits. They will have a number of clips. Will they be
22 provided with a laptop if they do want to listen to those?

23 THE COURT: Yes.

24 MR. GIBBS: Thank you. That was my only --

25 THE COURT: Let me confirm that. Ms. Pham?

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1180

1 THE DEPUTY CLERK: Yes.

2 THE COURT: The answer is, "yes." And I'll be
3 reminded to tell them that.

4 JURY INSTRUCTIONS

5 THE COURT: Members of the jury, now that you've
6 heard the evidence and arguments of counsel, it becomes my
7 duty to give you instructions as to the law applicable to this
8 case. Now, you will not have these instructions in written
9 form, because they really don't exist in a form that I'm
10 prepared to give to you. But you will have a tape recording
11 of the instructions as I give them to you so that you can
12 listen to all or portions of it, if you wish. You're
13 certainly not required to.

14 All right. All of the instructions given to you by
15 the Court, those given to you at the opening or beginning of
16 the trial, those given to you during the trial, and these
17 final instructions must guide and govern your deliberations.
18 And it is your duty as jurors to follow the law as stated by
19 the Court and to apply the rules of law to the facts as you
20 find them from the evidence in the case.

21 Now, as I told you at the outset, counsel have quite
22 properly referred to some of the governing rules of law in
23 their arguments. If, however, any difference appears to you
24 between the law as stated by counsel and the law as provided
25 to you by the Court, of course you are to be governed by the

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

1 Court's instructions.

2 Now, nothing I say or -- nothing I say in these
3 instructions is to be taken as an indication that I have an
4 opinion as to -- about the facts of the case or what that
5 opinion is. It's not my function to determine the facts.
6 That's your function.

7 You're not to single out one instruction alone as
8 stating the law, but must consider the instructions as a whole
9 and neither are you to be concerned with the wisdom of any
10 rule of law stated by the Court.

11 Regardless of any opinion you may have as to what
12 you think the law ought to be, it would be a violation of your
13 sworn duty as jurors if you ignore the law as I give it to you
14 and apply some other law.

15 It would also be a violation of your sworn duty as
16 jurors of the facts to base a verdict upon anything but
17 evidence in the case.

18 You've been chosen as jurors for this trial in order
19 to evaluate all of the evidence received and to decide each of
20 the factual questions presented by the allegations brought by
21 the Government and the indictment and the pleas of not guilty
22 by the defendant.

23 In deciding the issues presented to you for decision
24 of trial, you must not be persuaded by bias, prejudice, or
25 sympathy for or against any of the parties in this case or by

1 any public opinion.

2 You should not be influenced by any person's race,
3 color, religion, national ancestry, or sex. Justice through
4 trial by jury must always depend upon the willingness of each
5 individual juror to seek the truth as to the facts from the
6 same evidence presented to all the jurors and to arrive at a
7 verdict by applying the same rules of law given to you by the
8 Court.

9 Now, as I've told you at the outset, the law
10 presumes a defendant to be innocent of a crime, thus the
11 defendant, although accused, begins the trial with a clean
12 slate with no evidence against him and the law permits nothing
13 but legal evidence presented before the jury to be considered
14 in support of any charge against the accused.

15 So the presumption of innocence alone is sufficient
16 to acquit a defendant unless the jurors are satisfied beyond a
17 reasonable doubt of the defendant's guilt after careful and
18 impartial consideration of all the evidence in the case.

19 It's not required that the Government prove guilt
20 beyond all possible doubt. The test is one of reasonable
21 doubt.

22 The jury will remember that a defendant is never to
23 be convicted on mere suspicion or conjecture. The burden is
24 always on the prosecution to prove guilt beyond a reasonable
25 doubt and this burden never shifts to a defendant for the law

1 never imposes on a defendant in a criminal case a burden or
2 duty of calling any witnesses or producing any evidence.

3 So if the jury, after careful and impartial
4 consideration of all the evidence in the case, has a
5 reasonable doubt that a defendant is guilty of the charge, it
6 must acquit.

7 Now, there's nothing particularly different in the
8 way that a juror should consider the evidence in a trial from
9 that in which any reasonable and careful person would treat
10 any very important question that must be resolved by examining
11 facts, opinions, and evidence.

12 You're expected to use your good sense in
13 considering and evaluating the evidence in the case for only
14 those purposes for which it has been received and to give such
15 evidence a reasonable and fair construction in the light of
16 your common knowledge of the natural tendencies and
17 inclinations of human beings.

18 If a defendant be proved guilty beyond a reasonable
19 doubt, say so. If not proved guilty beyond a reasonable
20 doubt, say so. Keep constantly in mind that it would be a
21 violation of your sworn duty to base a verdict upon anything
22 other than the evidence received in the case and the
23 instructions of the Court.

24 Remember as well, as I've already mentioned, the law
25 never imposes on a defendant in a criminal case the burden or

1 duty of calling any witnesses or producing any evidence
2 because the burden of proving guilt beyond a reasonable doubt
3 is always with the Government.

4 Now, the evidence in this case consists of the sworn
5 testimony of the witnesses, regardless of who may have called
6 them, all exhibits received in evidence, regardless of who may
7 have produced them. And you will have all of those exhibits
8 with you in the jury room, including a device to help you play
9 conversations if you wish to.

10 Now, I'm not going to send back -- although I will
11 if you ask -- I'm not going to send back the telephone and the
12 chip. It's fragile and all that sort of thing. But if you
13 want to see it, I will send it back to you. I'll ask that you
14 don't power up the phone. But it's there for you to see. All
15 you have to do is tell the court security officer, who will be
16 right outside where you're deliberating, that you want that
17 and I will see that you are provided it.

18 Now, the evidence in the case, as I told you, it
19 consists of the sworn testimony of the witnesses, regardless
20 of who called them, and all exhibits received in evidence,
21 regardless of who produced them, and all facts, which may have
22 been agreed to or stipulated, and there were many
23 stipulations, as you will recall, and all facts and events,
24 which may have been judicially noticed. There was one
25 incident there, I believe, where I judicially noticed. What

1 was it?

2 MR. GIBBS: The hotel room meeting was in the
3 Eastern District of Virginia, Judge.

4 THE COURT: Does that comport with your
5 recollection?

6 MR. KAMENS: It does, Your Honor.

7 THE COURT: All right.

8 MR. GIBBS: And, Your Honor, there was also -- you
9 took judicial notice of the executive order as well, so there
10 were actually two things.

11 MR. KAMENS: That's correct.

12 THE COURT: All right. When the attorneys on both
13 sides stipulate or agree as to the existence of a fact, you
14 may accept the stipulation as evidence and regard that fact as
15 proof. You're not required to do so, however, since you are
16 the sole judges of the facts.

17 And as I said, I did take judicial notice of certain
18 facts or events. When the Court declares that it has taken
19 judicial notice of some fact or event, you may accept the
20 Court's declaration as evidence and regard as proved that fact
21 or event which has been judicially noticed. You are not
22 required to do so, however, since you're the sole judges of
23 the facts.

24 Any proposed testimony, any proposed exhibit as to
25 which an objection was sustained by the Court, and any

1 testimony or exhibit ordered stricken by the Court must be
2 entirely disregarded. And, of course, anything you may have
3 seen or read or heard outside the courtroom is not proper
4 evidence and must be entirely disregarded.

5 Now, questions, objections, statements, and
6 arguments of counsel are not evidence in the case. You're to
7 base your verdict only on evidence received in the case. And
8 in your consideration of the evidence received, however,
9 you're not limited to the bald statements of the witnesses or
10 to the bald assertions in the exhibits. In other words,
11 you're not limited solely to what you see and hear as the
12 witnesses testify or as the exhibits are admitted.

13 You're permitted to draw from the facts which you
14 find have been proved such reasonable inferences as you feel
15 are justified in the light of your experience and common
16 sense.

17 As I told you at the outset, there are two types of
18 evidence generally presented during a trial, direct evidence
19 and circumstantial evidence. Now, direct evidence is the
20 testimony of a person who asserts or claims to have actual
21 knowledge of a fact such as an eyewitness. Circumstantial
22 evidence is proof of a chain of facts and circumstances
23 indicating the existence of a fact.

24 Now, the law makes no distinction between the weight
25 or value to be given to either direct or circumstantial

1 evidence, nor is a greater degree of certainty required of
2 circumstantial evidence than of direct evidence. You should
3 weigh all the evidence in the case. And after weighing all
4 the evidence, if you're not convinced of the guilt of the
5 defendant beyond a reasonable doubt, you must find the
6 defendant not guilty.

7 Now, inferences are simply deductions or conclusions
8 which reason and common sense lead the jury to draw from the
9 evidence in the case.

10 Testimony and exhibits can be admitted into evidence
11 during a trial only if certain criteria or standards are met.
12 It's a sworn duty of the attorney on each side of a case to
13 object when the other side offers testimony or exhibits which
14 that attorney believes is not properly admissible under the
15 rules of law.

16 Only by raising an objection can a lawyer request
17 and obtain a ruling from the Court on the admissibility of the
18 evidence being offered by the other side. And you should not
19 be influenced against an attorney or his or her client because
20 the attorney has made objections.

21 Do not attempt, moreover, to interpret my rulings
22 as -- on objections as somehow indicating how I think you
23 should decide the case. I'm simply making a ruling on a legal
24 question by allowing -- by allowing testimony or other
25 evidence to be introduced over the objection of an attorney.

1 The Court does not, unless I expressly stated,
2 indicate any opinion as to the weight or effect of all the
3 evidence.

4 On the other hand, where the Court has sustained an
5 objection to a question addressed to a witness, the jurors
6 must disregard the statement entirely and you may draw no
7 inference from the wording of the question or speculate as to
8 what this would have -- what the witness would have said had
9 he or she been permitted to answer the question.

10 Now, it's a duty of the Court to admonish or caution
11 an attorney who, out of zeal for his or her cause, does
12 something which I feel is not in keeping with the Rules of
13 Evidence or Procedure. You're to draw absolutely no inference
14 against the side to whom an admonition or caution of the Court
15 may have been addressed during the trial of this case.

16 Now, during the course of the trial, I occasionally
17 asked questions of a witness. Do not assume that I hold any
18 opinion on the matters to which my questions may relate. The
19 Court may ask a question simply to clarify matters, not to
20 help one side of the case or the other .

21 And remember, at all times, that you as jurors are
22 the sole judges of the facts of this case.

23 Now, in certain instances, evidence may have been
24 admitted only for a particular purpose and not generally for
25 all purposes. For the limited purpose for which this evidence

U.S. v. Mallory

1189

1 has been received, you may give it such weight as you may --
2 as you feel it deserves. You may not, however, use this
3 evidence for any other purpose or against any party not
4 specifically mentioned.

5 Now, tape recordings of conversations have been
6 received in evidence and have been played for you.
7 Typewritten transcripts of these tape-recorded conversations
8 have been furnished to you for your -- solely for your
9 convenience in assisting you in following the conversation or
10 in identifying the speakers.

11 Now, this next part I should have reviewed with you.
12 Typically the tapes themselves are in evidence, which they are
13 here, that is, the conversations. They are, are they not?

14 MR. GIBBS: They are, Judge.

15 THE COURT: Mr. Kamens.

16 MR. KAMENS: Your Honor, there is one exhibit where
17 the transcript is admitted without the tape --

18 THE COURT: Well, let me cover this. Typically the
19 typewritten transcripts are just furnished for the convenience
20 of the parties. It's the tape or the conversation itself that
21 is the evidence. But in this case, I admitted the
22 transcripts, so they are evidence.

23 What's the one situation, Mr. Kamens?

24 MR. KAMENS: Can I confer with --

25 THE COURT: Yes, of course.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1190

1 (Discussion off the record.)

2 MR. KAMENS: It's Defense Exhibit 3B-9, Your Honor.

3 THE COURT: Which was?

4 MR. KAMENS: It is a short clip that was introduced
5 under completeness.

6 THE COURT: All right. And that -- they have that
7 clip, so that's the evidence.

8 (Discussion off the record.)

9 MR. KAMENS: The transcript was in evidence. We
10 were trying to streamline, and so we just put in the
11 transcript, not -- and we did play the tape --

12 THE COURT: Well, the transcript is in evidence,
13 isn't it?

14 MR. KAMENS: Yes, Your Honor.

15 THE COURT: So I admitted all of the transcripts, so
16 they are all evidence. And you don't have to draw a
17 distinction between what you hear and the transcript because I
18 admitted all of it without objection.

19 So I don't think anything further on No. 13 is
20 necessary. Any objection to omitting it?

21 MR. GIBBS: None from the Government, Judge.

22 MR. KAMENS: None, Your Honor.

23 THE COURT: Now, the Rules of Evidence ordinarily do
24 not permit witnesses to testify as to their own opinions or
25 their own conclusions about issues in the case.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

1 An exception to this rule, as I told you earlier,
2 are witnesses who are described as expert witnesses. And an
3 expert witness is someone who by virtue of education or by
4 experience may have become knowledgeable in some technical,
5 scientific, or very specialized area.

6 And if such knowledge or experience may be of
7 assistance to you in understanding some of the evidence in
8 this case or in determining a fact, an expert witness in that
9 area may state an opinion as to relevant material matter in
10 which he or she claims to be an expert.

11 You should consider the expert opinion received in
12 evidence in this case and give it such weight as you may think
13 it deserves.

14 You should consider the testimony of the expert
15 witness just as you consider other evidence in the case. If
16 you should decide that the opinion of the expert witness is
17 not based on sufficient education or experience, or if you
18 should conclude that the reasons given in support of the
19 opinion are not sound or if you should conclude that the
20 opinion is outweighed by other evidence, you may disregard the
21 opinion in part or in its entirety. As I've told you several
22 times , you, the jury, are the sole judges of the facts of
23 this case.

24 Does 15 have any application here? I inserted it,
25 because I thought it might potentially, but I don't, at the

U.S. v. Mallory

1192

1 moment, immediately recall any.

2 MR. GIBBS: This would be Government Exhibit 8-21, I
3 believe, which was the Jim Hamrock -- sort of the work product
4 he put together regarding the CovCom, Your Honor.

5 THE COURT: And you agree with that, Mr. Kamens?

6 MR. KAMENS: Yes, Your Honor.

7 THE COURT: All right. Charts or summaries, Mr.
8 Gibbs mentioned them -- charts or summaries have been prepared
9 by the Government and have been admitted into evidence and
10 have been shown to you during the trial for the purpose of
11 explaining facts that are allegedly contained in books,
12 records, or other documents which are in evidence in the case.

13 You may consider the charts and summaries as you
14 would any other evidence admitted during the trial and give it
15 such weight or importance, if any, as you feel it deserves.

16 Now, if any reference by the Court or by counsel to
17 matters of testimony or exhibits does not coincide with your
18 own recollection of that evidence, it's your recollection
19 which controls -- which should control during your
20 deliberations and not the statements of the Court or counsel,
21 because you are the sole judges of the evidence received in
22 this case.

23 And your decision on the facts of this case should
24 not be determined by the number of witnesses testifying or for
25 or against the party. You should consider all the facts and

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

1 circumstances in evidence to determine which of the witnesses
2 you choose to believe or not believe. You may find that the
3 testimony of a smaller number of witnesses on one side is more
4 credible than the testimony of a greater number of witnesses
5 on the other.

6 Now, as I told you at the outset, you, as the
7 jurors, are the sole and exclusive judges of the credibility
8 of each of the witnesses called to testify in this case and
9 only you determine the importance or the weight that their
10 testimony deserves.

11 After making your assessment concerning the
12 credibility of a witness, you may decide to believe all of
13 that witness' testimony, only a portion of it, or none of it.

14 Now, in making your assessment, you should carefully
15 scrutinize all the testimony given, the circumstances under
16 which each witness has testified and all of the other evidence
17 which tends to show whether a witness is worthy of belief.

18 Consider each witness' intelligence, motive to
19 falsify, state of mind, and appearance and manner while on the
20 stand. Consider the witness' ability to observe the matters
21 as to which he or she has testified and consider whether he or
22 she impresses you as having an accurate memory or recollection
23 of these matters.

24 Consider also any relation each witness may bear to
25 either side of the case, the manner in which each witness

1 might be affected by your verdict and the extent to which, if
2 at all, each witness is either supported or contradicted by
3 other evidence of the case.

4 Now, inconsistencies or discrepancies in the
5 testimony of a witness or between the testimony of different
6 witnesses may or may not cause you to disbelieve or discredit
7 such testimony. Two or more persons witnessing an incident or
8 a transaction may simply see or hear it differently.

9 Innocent misrecollection like failure of
10 recollection is not an uncommon experience. In weighing the
11 effect of a discrepancy, however, always consider whether it
12 pertains to a matter of importance or an insignificant detail
13 and consider whether the discrepancy results from innocent
14 error or from intentional falsehood.

15 After making your own judgment or assessment
16 concerning the believability of a witness, you could then
17 attach such importance or weight to that testimony, if any,
18 that you may feel it deserves and you'll then be in a position
19 to decide whether the government has proven the charges beyond
20 a reasonable doubt.

21 Now, the defendant in a criminal trial has an
22 absolute right under our Constitution not to testify. The
23 fact that the defendant did not testify must not be discussed
24 or considered by the jury in any way when deliberating and in
25 arriving at your verdict.

1 No inference of any kind may be drawn from the fact
2 that the defendant decided to exercise his privilege under the
3 Constitution and did not testify.

4 As stated before, the law never imposes on a
5 defendant in a criminal case the burden or duty of calling any
6 witnesses or producing any evidence.

7 Now, the defendant has offered opinion evidence of
8 his patriotism and his trait for being a risk-taking patriotic
9 citizen. The jury should consider this evidence, along with
10 all the other evidence in the case, in reaching its verdict.

11 Evidence inconsistent with these traits of character
12 ordinarily involved in the commission of the crimes charged
13 may give rise to a reasonable doubt since the jury may think
14 it improbable or unlikely that a person who is a patriotic
15 citizen would commit such crime or crimes.

16 Now, evidence relating to any alleged statement,
17 confession, admission, or act or omission alleged to have been
18 made or done by a defendant outside of Court, and after a
19 crime has been committed, should always be considered by the
20 jury with caution and weighed with great care.

21 All such alleged statements, confessions, or
22 admissions should be disregarded entirely unless the other
23 evidence in the case convinces the jury beyond a reasonable
24 doubt that the statement, confession, admission, or act or
25 omission was made or done knowingly and voluntarily.

1 In determining whether any statement, confession,
2 admission, or act or omission alleged to have been made by a
3 defendant outside of Court, and after a crime has been
4 committed, was knowing and voluntarily made or done, the jury
5 should consider the age, training, education, occupation, and
6 physical and mental condition of the defendant and his
7 treatment while in custody or under interrogation as shown by
8 the evidence in the case.

9 Also, consider all other circumstances in evidence
10 surrounding the making of the statement, confession, or
11 admission. If after considering the evidence, you determine
12 that a statement, confession, admission, or act or omission
13 was made or done knowingly and voluntarily, you may give it
14 such weight as you may feel it deserves under the
15 circumstances.

16 Now, as I told you at the outset, an indictment is
17 but a formal means used by the Government to accuse a
18 defendant of a crime. It is not itself evidence of any kind
19 against the defendant.

20 The defendant's presumed to be innocent of the
21 crimes charged even though his indictment has been returned
22 against the defendant. This indictment has been returned
23 against the defendant. This defendant begins the trial with
24 absolutely no evidence against him.

25 And he's pled not guilty to the indictment, and

U.S. v. Mallory

1197

1 therefore denies that he's guilty of the charges.

2 And you will have the indictment with you in the
3 jury room.

4 Now, the defendant is not on trial for any act or
5 conduct not specifically charged in the indictment. And in a
6 separate charge -- a separate crime is charged in each of the
7 four counts of the indictment.

8 Each charge and the evidence pertaining to it should
9 be considered separately by the jury. The fact that you may
10 find the defendant guilty or not guilty as to one of the
11 offenses charged should not control your verdict as to the
12 other offenses charged.

13 Now, you'll see in the indictment charges that the
14 offenses alleged were committed on or about a certain date,
15 although it's necessary for the Government to prove beyond a
16 reasonable doubt that the offenses were committed on a date
17 reasonably near the dates alleged in the indictment. It is
18 not necessary for the Government to prove that the offenses
19 were committed precisely on the dates charged.

20 The Court also instructs the jury that although the
21 indictment may charge a defendant with committing an offense
22 in several ways using the injunctive, that is, "and" language,
23 I instruct you that it is not necessary for the Government to
24 prove that defendant did each of those things. It is
25 sufficient that the Government prove beyond a reasonable doubt

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1198

1 that the defendant did any of these alternative acts charged.

2 Now, Count 2 of the indictment -- and I'm going to
3 start with Count 2, because Count 3 -- or Count 1 is a
4 conspiracy to do what's in Count 2 and Count 3. So I'm going
5 to start with Count 2 and go to Count 3 and then I'll come
6 back to Count 1 and finally to Count 4.

7 Count 2 of the indictment charges that between on or
8 about February 22, 2017, and June 22, 2017, in Loudoun County,
9 in the Eastern District of Virginia and elsewhere, including
10 locations outside of the jurisdiction of any particular state
11 or districts, defendant Kevin Patrick Mallory did knowingly
12 unlawfully communicate, deliver, and transmit to a foreign
13 government to wit the government of the People's Republic of
14 China and representatives, officers, agents, employees,
15 subjects, and citizens thereof directly and indirectly
16 classified documents and information relating to the national
17 defense of the United States with intent and reason to believe
18 that such documents and information were to be used to the
19 injury to the United States and to the advantage of a foreign
20 nation, namely the Government's -- the Government of the
21 People's Republic of China, all in violation of Title 18,
22 Section 9, 794(a), which provides in pertinent part that
23 whoever with intent or reason to believe that it is to be used
24 to the injury of the United States or to the advantage of a
25 foreign nation communicates, delivers, or transmits or

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

1 attempts to communicate, deliver, or transmit to any foreign
2 government or to any representative, officer, agent, employee,
3 subject, or citizen thereof either directly or indirectly any
4 document, writing, note, or information relating to the
5 national defense shall be guilty of an offense against the
6 United States. That's Count 2.

7 Now, Count 3 is the following: Between on or about
8 February 22, 2017, and June 22, 2017, in Loudoun County, in
9 the Eastern District of Virginia and elsewhere, including
10 locations outside of the jurisdiction of any particular state
11 or district, defendant Kevin Patrick Mallory did knowingly and
12 unlawfully attempt to communicate, deliver, and transmit to a
13 foreign government to wit the government of the People's
14 Republic of China and representatives, officers, agents,
15 employees, subjects, and citizens thereof directly and
16 indirectly classified documents and information relating to
17 the national defense of the United States with intent and
18 reason to believe that such documents and information were to
19 be used to the injury of the United States and to the
20 advantage of a foreign nation namely the Government of the
21 People's Republic of China in violation of Section 794(a) of
22 Title 18.

23 Now, the essential elements of delivery of national
24 defense information to a foreign government, each of which the
25 Government must prove beyond a reasonable doubt, are as

U.S. v. Mallory

1200

1 follows:

2 First, that the defendant Kevin Patrick Mallory
3 communicated, delivered, or transmitted a document, writing,
4 note, information to a foreign government, namely the People's
5 Republic of China or to a representative, officer, agent,
6 employee, subject, or citizen thereof either directly or
7 indirectly.

8 Second, these are the elements of the offense of
9 Count 2. I should have made that clear.

10 First, that the defendant Kevin Patrick
11 communicated, delivered, transmitted a document, writing,
12 note, or information to a foreign government, namely the
13 People's Republic of China or to a representative, officer,
14 agent, employee, subject, or citizen thereof either directly
15 or indirectly.

16 Second, that such information related to the
17 national defense of the United States.

18 Third, that the defendant Kevin Patrick Mallory
19 acted with intent or reason to believe that such information
20 was to be used to the injury of the United States or to the
21 advantage of a foreign nation, that is, the People's Republic
22 of China.

23 Fourth, that the defendant, Kevin Patrick Mallory,
24 acted willfully in communicating, delivering, or transmitting
25 information related to the national defense. Those are the

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1201

elements of Count 2.

Now, the elements of Count 3, the essential elements of Count 3, which the Government must prove beyond a reasonable doubt are as follows:

First, that the defendant, Kevin Patrick Mallory, attempted to communicate, deliver, or transmit a document, writing, note, or information to a foreign government, namely the People's Republic of China or to a representative, officer, agent, employee, subject, or citizen thereof either directly or indirectly.

Second, that such information related to the national defense of the United States.

Third, that the defendant, Kevin Patrick Mallory, acted with the intent or reason to believe that such information was to be used to the injury of the United States or to the advantage of a foreign nation, that is, the People's Republic of China.

And fourth, that Kevin Patrick Mallory acted willfully in communicating, deliberating, or transmitting the information related to the national defense.

Now, with regard to Count 3 of the indictment, proof of an attempt requires the Government to prove the following beyond a reasonable doubt:

First, that the defendant intended to commit the crime of delivery of national defense information.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

1 Second, that the defendant did some act that was --
2 that was a substantial step in an effort to bring about or
3 accomplish the crime. And a substantial step is a direct act
4 in a course of conduct planned to culminate in commission of a
5 crime, that is, strongly corroborative of the defendant's
6 criminal purpose.

7 A substantial step is more than mere preparation,
8 but less than completion of the crime.

9 Now, the term "national defense" is a broad term
10 which refers to the United States military and Naval
11 establishments, intelligence, and to all related activities of
12 national preparedness.

13 To prove that documents, writings, notes, or
14 information relate to the national defense, there are two
15 things that the Government must prove:

16 First, the Government must prove that the material
17 is closely held by the United States Government. Where
18 information has been made public by the United States
19 government and is found sources lawfully available to the
20 general public, it's not closely held and as such does not
21 relate to the national defense.

22 Similarly, where the information is lawfully
23 available to the public and the United States Government has
24 made no effort to guard such information, the information
25 itself does not relate to the national defense.

1 Classified information does not become lawfully
2 available by virtue of having been leaked. In determining
3 whether material is closely held, you may consider whether it
4 has been classified by appropriate authorities and whether it
5 remained classified on the date or dates pertinent to the
6 indictment.

7 Second, the Government must prove that the
8 disclosure of the material would be potentially damaging to
9 the United States or might be useful to a foreign nation or an
10 enemy of the United States.

11 Now, a defendant has reason to believe, as I've use
12 that phrase, a defendant has reason to believe if the
13 defendant knows facts from which he concluded or reasonably
14 should have concluded that the information related to the
15 national defense was to be used for prohibited purposes. It
16 does not mean that the defendant acted negligently.

17 In determining whether a defendant has reason to
18 believe, the question whether a reasonable person in
19 defendant's position would have reached the same conclusion.

20 Now, I also told you that the Government must also
21 prove that the defendant acted willfully in communicating,
22 delivering, transmitting information related to the national
23 defense.

24 An act is done willfully if it is done voluntarily
25 and intentionally with the specific intent to do something

1 that the law forbids, that is to say with a bad purpose either
2 to disobey or to disregard the law with respect to the
3 offenses that are charged in the indictment.

4 Specific intent must be proved beyond a reasonable
5 doubt before a defendant can be convicted. Specific intent,
6 as that term suggests, requires more than a general intent to
7 engage in a certain conduct.

8 To establish specific intent, the Government must
9 prove that the defendant knowingly did an act which the law
10 forbids. It is the Government's burden to present affirmative
11 evidence of the existence of the required unlawful intent.

12 Again, in determining whether or not the intent
13 existed, you may look at all the facts and circumstances
14 involved in this case.

15 Now, we return to Count 1.

16 Count 1 charges that between on or about
17 February 22, 2017, and June 22, 2017, in Loudoun County, in
18 the Eastern District of Virginia and elsewhere, including
19 locations outside of the jurisdiction of any particular state
20 or district, defendant Kevin Patrick Mallory did knowingly and
21 unlawfully conspire with an unindicted co-conspirator and
22 others, known and unknown, to communicate, deliver, and
23 transmit to a foreign government to wit the Government of the
24 People's Republic of China and representatives, officers,
25 agents, employees, subjects, and citizens thereof directly and

1 indirectly classified documents and information relating to
2 the national defense of the United States with the intent and
3 reason to believe that such documents and information were to
4 be used to the injury of the United States and to the
5 advantage of a foreign nation, namely the government of the
6 People's Republic of China in violation of Section 794(c) of
7 Title 18, which provides -- which defines the offense of
8 conspiracy to commit the offense of delivery of national
9 defense information to a foreign government.

10 This statute provides in pertinent part that if two
11 or more persons conspire to commit the offense of delivery of
12 national defense information, and one or more of such persons
13 do any act or effect the object of the -- or to effect the
14 object of -- let me start again.

15 This is what the statute provides in pertinent part.
16 If two or more persons conspire to commit the offense of
17 delivery of national defense information and one or more of
18 such persons do any act to effect the object of the
19 conspiracy, each of the parties to such a conspiracy shall be
20 guilty of an offense against the United States.

21 Now, Count 1 charges the defendant with conspiracy
22 to commit the offense of delivery of national defense
23 information to a foreign government. So in order for you to
24 find the defendant guilty of that particular charge, the
25 Government must prove each of the following three elements

1 beyond a reasonable doubt:

2 First, that the conspiracy agreement or
3 understanding as described in Count 1 of the indictment was
4 formed, reached, or entered into by two or more persons.

5 Second, that at sometime during the existence or
6 life of the conspiracy or understanding, the defendant knew
7 the purpose of the agreement; and with that knowledge, then
8 willfully joined the conspiracy agreement or understanding.

9 And third, that at sometime during the existence or
10 life of the conspiracy agreement or understanding, one of its
11 alleged members knowingly performed one of the overt acts
12 charged in the indictment and did so in order to further or
13 advance the purpose of the agreement.

14 And you will find the overt acts listed in the
15 indictment.

16 Now, a criminal conspiracy is an agreement or a
17 mutual understanding knowingly made or knowingly entered into
18 by at least two people to violate the law by some joint or
19 common plan or course of action.

20 A conspiracy is, in a very true sense, a partnership
21 in crime. A conspiracy or agreement to violate the law, like
22 any other kind of agreement or understanding, need not be
23 formal, written, or even expressed directly in every detail.

24 The Government must prove that the defendant and at
25 least one other person knowingly and deliberately arrived at

1 an agreement or understanding that they and perhaps others
2 would violate some laws by means of some common plan or course
3 of action as alleged in Count 1 of the indictment.

4 It's proof of this conscious understanding and
5 delivered agreement by the alleged members that should be
6 central to your consideration of the charge of conspiracy.

7 Now, to prove the existence of the conspiracy or an
8 illegal agreement, the Government is required to produce a
9 written contract between the parties or even produce evidence
10 of an expressed oral agreement spelling out all of the details
11 of the understanding.

12 To prove that a conspiracy existed, moreover, the
13 Government is not required to show that all of the parties --
14 I'm sorry -- that all of the people named in the indictment as
15 members of the conspiracy were, in fact, parties to the
16 agreement or that all of the members of the alleged conspiracy
17 were named or charged or that all of the people whom the
18 evidence shows were actually members of a conspiracy agreed to
19 all of the means or methods set out in the indictment.

20 Unless the Government proves beyond a reasonable
21 doubt that a conspiracy as just explained actually existed,
22 then you must acquit the defendant of the Count 1 conspiracy
23 claim.

24 Now, before the jury may find that the defendant or
25 any other person became a member of the conspiracy charged in

1 the indictment, the evidence in the case must show beyond a
2 reasonable doubt that the defendant knew the purpose or goal
3 of the agreement or understanding and deliberately entered
4 into the agreement intending in some way to accomplish the
5 goal or purpose of this common plan or joint action.

6 If the evidence establishes beyond a reasonable
7 doubt that the defendant knowingly and deliberately entered
8 into an agreement to communicate, deliver, or transmit
9 information relating to the national defense, to a foreign
10 government, the fact that the defendant did not join the
11 agreement at its beginning and did not know or did not know
12 all of the details of the agreement or did not participate in
13 each act of the agreement or did not play a major role in
14 accomplishing the unlawful goal is not important to your
15 decision regarding membership in a conspiracy.

16 Merely associating with others and discussing common
17 goals, mere similarity of conduct between or among such
18 persons, merely being present at the place where a crime takes
19 place or is discussed or even knowing about criminal conduct
20 does not of itself make someone a member of the conspiracy or
21 a conspirator.

22 In order to sustain its burden of proof under
23 Count 1, the Government must prove beyond a reasonable doubt
24 that one of the members of the alleged conspiracy or agreement
25 knowingly performed at least one overt act and that this overt

1 act was performed during the existence or life of the
2 conspiracy and that it was done somehow to further the goal of
3 the conspiracy or agreement.

4 The term "overt act" means some type of outward
5 objective action performed by one of the parties to or one of
6 the members of the agreement or conspiracy which evidences
7 that agreement.

8 Although you must unanimously agree that the same
9 overt act was committed, the Government is not required to
10 prove more than one of the overt acts charged in the
11 indictment. The overt act may, but for the alleged illegal
12 agreement, appear totally innocent and legal.

13 In order to sustain its burden of proof under
14 Count 1 of the indictment, that is, conspiracy to gather or
15 deliver national defense information to a foreign government,
16 the Government must prove that the defendant acted with the
17 same intent that I instructed you as required to commit the
18 offense of gathering or delivering national defense
19 information.

20 That is the same intent that I instructed you with
21 respect to Counts 2 and Count 3.

22 The Government is not required to prove that the
23 parties or members of the alleged agreement or conspiracy were
24 successful in achieving any or all of the objects of the
25 agreement or conspiracy.

U.S. v. Mallory

1210

1 Now, we come to Count 4. Count 4 of the indictment
2 charges that on or about May 24, 2017, in Loudoun County,
3 Virginia -- Loudoun County in the Eastern District of
4 Virginia, defendant Kevin Patrick Mallory did knowingly and
5 willfully make materially false, fictitious, and fraudulent
6 statements or representations to the Government in a matter
7 within the jurisdiction of the executive branch of the
8 Government or the United States.

9 Specifically, Kevin Patrick Mallory knew that the
10 FBI was investigating his conducts with in- -- his contacts
11 with individuals working with the Government of the People's
12 Republic of China, and he also knew that the FBI was
13 attempting to determine if Mallory had provided any classified
14 documents to individuals working for the People's Republic of
15 China.

16 Nonetheless, in response to the FBI's questions,
17 Mallory falsely stated to FBI agents that he had not provided
18 additional documents beyond two -- beyond two unclassified
19 white papers to individuals he identified as People's Republic
20 of China intelligence officers when in truth and in fact, as
21 he then well knew, he previously provided at least two
22 classified documents to individuals he knew to be People's
23 Republic of China intelligence officers.

24 And second, B, that he falsely stated to FBI agents
25 that he never transmitted documents other than a text message

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1211

1 using a covert communications device provided to him by the
2 person he knew to be a People's Republic of China intelligence
3 officer when in truth and in fact, as he then well knew, he
4 had previously used that device to transmit at least two
5 classified documents to the People's Republic of China
6 intelligence officer, all of that in violation of
7 Section 1001(a)(2) of Title 18.

8 And that statute provides and defines the offense of
9 making a false or fictitious or fraudulent statement by
10 providing in pertinent part that whoever in any manner -- in
11 any matter -- I'm sorry -- whoever in any matter within the
12 jurisdiction of the executive legislative or judicial branch
13 of the Government of the United States knowingly and willfully
14 makes materially false, fictitious, or fraudulent statement or
15 representation shall be guilty of an offense against the
16 United States.

17 So the essential elements of making a false
18 statement, fictitious or fraudulent statement, each of which
19 the Government must prove beyond a reasonable doubt are as
20 follows:

21 These are the four elements: First, that the
22 defendant Kevin Patrick Mallory made a false, fictitious, or
23 fraudulent statement or representation to the Government as
24 detailed in Count 4 of the indictment.

25 Second, that in making the false, fictitious, or

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1212

1 fraudulent statement, the defendant acted willfully knowing
2 that the statement was false.

3 Third, that the statement was made in a matter -- in
4 a manner -- I'm sorry -- that the statement was made in a
5 matter within the jurisdiction of the executive legislative or
6 judicial branch of the Government of the United States.

7 And fourth, that the statement was made -- that the
8 statement made by the defendant was material to the
9 Government.

10 Now, a false or fictitious statement or
11 representation is an assertion which is untrue when made or
12 when used or which is known by the person making it or using
13 it to be untrue.

14 A fraudulent statement or representation is an
15 assertion which is known to be untrue and which is made or
16 used with intent to deceive.

17 The test of materiality is whether the false
18 statement has a natural tendency to influence a government
19 action or is capable of influencing a government action. It
20 is not necessary for the Government to prove that the
21 statement here alleged did influence -- statements here
22 alleged did influence a government action.

23 Now, Count 4 of the indictment charging defendant
24 with knowingly and willfully making a material -- I'm sorry --
25 Count 4 of the indictment charging defendant with knowingly

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

1 and willfully making materially false, fictitious, and
2 fraudulent statements or representations to the Government
3 alleges that the defendant made two false or fraudulent
4 statements.

5 The Government is not required to prove that both of
6 the statements that are alleged in Count 4 of the indictment
7 are false -- are, in fact, false. In other words, it doesn't
8 have to prove both statements are, in fact, false. But each
9 juror must agree with each other -- each of the other jurors,
10 however, that the same statement or representation alleged in
11 Count 4 to be false, fictitious, or fraudulent is, in fact,
12 false, fictitious, or fraudulent.

13 The jury need not unanimously agree on both such
14 statements alleged, but in order to convict must unanimously
15 agree upon at least one such statement as false, fictitious,
16 or fraudulent when knowingly made by the defendant.

17 Unless the Government has proven the same false or
18 fraudulent statement as to each of you beyond a reasonable
19 doubt, you must acquit the defendant of the charge in Count 4
20 of the indictment.

21 Now, the intent of a person or the knowledge that a
22 person possesses at any given time may not ordinarily be
23 proved directly because there's no way of directly
24 scrutinizing or fathoming the workings of the human mind.

25 In determining the issue of what a person knew or

U.S. v. Mallory

1214

1 what a person intended at a particular time, you may consider
2 any statements made or acts done by that person and all other
3 facts and circumstances received in evidence which may aid you
4 in your determination of that person's knowledge or intent.

5 You may infer, but you're certainly not required to
6 infer, that a person intends the natural and probable
7 consequences of acts knowingly done or knowingly omitted.

8 It's entirely up to you, however, to decide what
9 facts to find from the evidence received during this trial.
10 And, knowingly, as used in these instructions, to describe the
11 alleged state of mind of the defendant means that he was
12 conscious and aware of his action, realized what he was doing
13 or what was happening around him and did not act because of
14 ignorance, mistake, or accident.

15 Now, you must not base your verdict in any way on
16 sympathy or bias or guesswork or speculation. Your verdict
17 must be based solely on the evidence and the instructions of
18 the Court.

19 Now, your verdict must represent the considered
20 judgment of each juror. In other words, in order to return a
21 verdict, it is necessary that each juror agree thereto. Your
22 verdict must, therefore, be unanimous.

23 It is your duty as jurors to consult with one
24 another and to deliberate with a view of reaching an agreement
25 if you can do so without violence to your individual judgment.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1215

1 You must each decide the case yourself but only after an
2 impartial consideration of all the evidence in the case with
3 your fellow jurors.

4 And in the course of your deliberations do not
5 hesitate to re-examine your own views and to change your
6 opinion if convinced it is erroneous but do not surrender your
7 honest conviction as to the weight or effect of the evidence
8 solely because of the opinion of your fellow jurors or for the
9 mere purpose of returning a verdict. Remember at all times
10 you're not partisans, you are judges, judges of the facts and
11 your sole interest is to seek the truth from the evidence
12 presented in the case.

13 And the punishment provided by law for the offenses
14 charged in the indictment is a matter exclusively within the
15 province of the Court and should never be considered by the
16 jury in any way of arriving at an impartial verdict as to the
17 offenses charged.

18 Now, during your deliberations, you must not
19 communicate or provide any information to anyone by any means
20 about this case. You may not use any electronic device. In
21 other words, when you are deliberating, you can't communicate
22 with anybody outside. You can't investigate. You can't do
23 anything. There's a whole list of devices here, which I
24 frankly know nothing about. But you can't do anything. You
25 can't access any electronics, Facebook, MySpace, LinkedIn,

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1216

1 YouTube, Twitter. I can go on and on, but it would only
2 create the impression, which is not true, that I know what all
3 those are. But you can't use anything like that to
4 communicate with anybody while you're deliberating.

5 Yes. You can't -- you can't use anything like that
6 to communicate to anyone any information about this case or to
7 conduct any research about this case. Until after I accept
8 your verdict.

9 Now, when you retire to the jury room, you'll select
10 one of your number to serve as your foreperson. The
11 foreperson will preside over your deliberation and will be
12 your spokesperson here in Court.

13 Forms of the verdict have been prepared for your
14 convenience, and I'm going to describe it to you now. It's
15 quite simple. It's a two-page document. It says at the top
16 "Verdict Form." And then there are four counts in the
17 indictment and there's a shorthand description for each of the
18 counts. For Count 1, it says, "Conspiracy to gather or
19 deliver defense information to aid a foreign government." And
20 then there's -- it says, "We, the jury, unanimously find Kevin
21 Patrick Mallory" -- you put in either not guilty or guilty as
22 you may find.

23 And then Count 2 is also a shorthand description,
24 "Delivering defense information to aid a foreign government."
25 And says, we, the jury, unanimously find defendant Kevin

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1217

1 Patrick Mallory either not guilty or guilty. And you have to
2 write in either not guilty or guilty, whichever you may find.

3 And then for Count 3, again, a shorthand description
4 of that charge and a place for you to write in either not
5 guilty or guilty.

6 And for Count 4, the same, material false
7 statements, we, the jury, unanimously find Kevin Mallory not
8 guilty or guilt of that charge. And then there's a place for
9 the foreperson to sign it and to date it.

10 Now, you'll take the form of the verdict, which has
11 been prepared for your convenience, to the jury room. And
12 when you reach your unanimous agreement as to your verdict,
13 you will have your foreperson fill it in, date it, and sign it
14 and setting forth the verdict on which you've unanimously
15 agree and then return with your verdict to the courtroom.

16 Now, it's important to add -- or proper to add the
17 caution that nothing in these instructions and nothing in any
18 form of the verdict prepared for your convenience is meant to
19 suggest or to convey in any way or manner any intimation as to
20 what verdict I think you should bring -- you should find.

21 What the verdict shall be is, as I've told you many
22 times, your sole and exclusive duty and responsibility.

23 Now, if it becomes necessary during your
24 deliberations to communicate with the Court, you may send a
25 note by the court security officer. And he will be standing

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1218

1 right outside -- not this door, but the door where you will be
2 in that lunch area or whatever it's called. He'll be standing
3 there. And the note should be signed by your foreperson or by
4 one or more members of the jury. Put the date and the time on
5 it.

6 No member of the jury should ever attempt to
7 communicate with the Court by any means other than by a signed
8 writing and the Court will never communicate with any member
9 of the jury on any subject touching the merits of the case
10 otherwise in an open -- then in writing or orally here in open
11 court.

12 Now, I will communicate with you on matters not
13 touching the merits of the case such as how long you wish to
14 deliberate, whether you've filled out your menu, in other
15 words, things not related to the merits of the case. You will
16 hear from me about that.

17 And you will note from the oath about to be taken by
18 Mr. Flood that he, too, as well as all other persons are
19 forbidden to communicate in any way or manner with any member
20 of the jury on any subject touching the merits of the case.

21 And bear in mind that you are never to reveal to any
22 person, not even to the Court, how the jury stands numerically
23 or otherwise on the questions before you until after you have
24 reached your unanimous verdict.

25 Now, I will have further instructions for you after

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1219

1 you have reached a verdict about your responsibilities with
2 respect to the classified information that was presented
3 during your trial. I don't see any need to give that
4 instruction now. It will have more effect if I do it after a
5 verdict has been reached. Is that -- you agree, Mr. Gibbs?

6 MR. GIBBS: It is, Your Honor.

7 THE COURT: Mr. Kamens?

8 MR. KAMENS: No objection.

9 THE COURT: All right. Now, I told you at the
10 outset that the moment of deliberation is a precise one. It's
11 now near at hand, but it's not quite here yet. At this point,
12 I will permit you to retire to the jury room or to the -- the
13 new jury room. I'm worried about the precedent I'm setting,
14 but so be it. I agree with you, it's just not a big enough
15 room, is it?

16 Anyway, you'll file in there, but don't begin your
17 deliberations. Do not begin discussing the case until
18 Mr. Flood has brought in all of the exhibits, the jury verdict
19 form, the tape recorder containing a recording of my
20 instructions. And in the jury room, you will already find any
21 devices you need to listen to any of the conversations. Is
22 that right, Ms. Pham?

23 THE DEPUTY CLERK: Yes.

24 THE COURT: All right. Now, once all of that is
25 brought in, and the door closes , and all of you are present,

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1220

1 that's when you may begin your deliberations, that is, you may
2 then begin to discuss the case among yourselves. And you may
3 deliberate as long or as little as you like. There is no
4 requirement. You must satisfy yourselves.

5 All right. Counsel, come quickly to the bench,
6 please, for a last conference.

7 (Bench Conference.)

8 THE COURT: All right. Apart from the objections
9 that were raised, I think chiefly the objection raised by
10 Mr. Kamens and Mr. Richman in the instructions conference, do
11 the parties have any other objections or corrections or
12 instructions?

13 MR. GIBBS: No objections and no corrections, Your
14 Honor.

15 MR. KAMENS: No, Your Honor.

16 THE COURT: Now, you are all aware, and as I'm sure
17 they are, too, only 12 get to deliberate. And so I will now
18 tell the twelfth -- the thirteenth person who they are and
19 I'll excuse them. But I will have them continue to refrain
20 from discussing the matter, because there could be
21 circumstances in which we will need their services.

22 Not likely, but possible.

23 And so I will tell them to continue to refrain from
24 discussing the matter or undertaking any investigation, and I
25 will have the deputy clerk contact them once a verdict is

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1221

1 reached.

2 MS. GELLIE: Your Honor, (indiscernible)
3 individually by the classified information instruction.

4 THE COURT: You mean individually at the end?

5 MS. GELLIE: Outside the presence of the jury.

6 THE COURT: Oh, you mean the one I'm going to
7 excuse?

8 MS. GELLIE: Yes.

9 THE COURT: Yes, I'll do that. There's only one.
10 I'll do that. And I am going to tell them now that I told you
11 you could take your books home afterwards, but maybe not. And
12 I'll tell them that now. Any objection?

13 MR. KAMENS: No, Your Honor.

14 THE COURT: And then I'll keep the -- I'll ask the
15 alternate to wait in the courtroom. And once they've filed
16 out, and once Mr. Flood then begins to take everything back, I
17 will have that person come to the bench and we'll do it here
18 at the bench. It won't be under seal, however. Well, the
19 person can stay there. I'll have them come to the podium,
20 that way it will be in the public record.

21 All right. Let's proceed.

22 (Open court.)

23 THE COURT: All right. Ladies and gentlemen, I'm
24 sure this hasn't escaped your attention. How many of you know
25 the number of people who deliberate in a federal criminal

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1222

1 trial? I see Mr. Mondoro smiling particularly broadly.

2 As you know, sir, you were chosen as an alternate,
3 and so I'm going to excuse you at this time.

4 However, two things. I want to caution you -- I
5 want you not to speak to anybody about this case or undertake
6 any investigation until the matter is entirely over, because
7 there could be circumstances that might arise in which we
8 would continue to need your services. And at that time, if
9 that were to occur, I would ask you have you been successful
10 in not speaking and not investigating.

11 Now, I'm a little chagrined to admit that I told you
12 that you would be able to take your books home. I was wrong.
13 You can keep your books and you can take your books into the
14 jury room, but the books need to be examined for -- to
15 determine whether they obtain classified information. I don't
16 know what's going to happen in that regard. So you may not
17 take your book home. Give it to the court security officer.

18 You, however, the rest of you, may take your books
19 into the room for deliberations, but at the end of the trial,
20 I will have a further instruction for you as well.

21 You know, I think I'll give it to everybody now.
22 Any objection to that?

23 MR. GIBBS: No, Your Honor.

24 MR. KAMENS: No, Your Honor.

25 THE COURT: All right. This is for everybody.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1223

1 As you all know, this has been a federal criminal
2 prosecution concerning the delivery of national defense
3 information, including classified information. And to try
4 this case, the Government had to show you the national defense
5 information that the defendant was charged with improperly
6 delivering, attempting to deliver, and conspiring to deliver
7 to a foreign government.

8 Therefore, some of the documents and testimony
9 presented to you during the trial relate to this national
10 defense information. Under the law, the Government is
11 entitled to have this type of information protected and to
12 have it remain confidential even though it was discussed in
13 the courtroom.

14 Therefore, while you would ordinarily be free to
15 discuss the trial with anyone once you have been excused from
16 the jury service, that is, once you've reached a verdict, if
17 you choose to do so, this case is different. I'm instructing
18 you that you may not at any time reveal to anyone any of the
19 national defense information or classified information
20 discussed or referenced at trial, thus you may discuss this
21 trial generally if you wish to do so, but you may not reveal
22 national defense information or classified information during
23 those discussions.

24 And if you've taken notes during this trial, I'm --
25 we're going to have your books collected. And I, frankly,

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1224

1 can't tell you what's going to happen to the books yet.
2 They'll either be destroyed or the classified information will
3 be redacted in some fashion and the books returned to you.

4 But let me assure you I'm not going to look at the
5 books. No lawyer is going to look at the books. Not only are
6 we not going to, we don't want to. And so we are not going to
7 look at it. If anybody looks at it, it will be -- somebody
8 will look at it. It will be -- I don't see that she's in the
9 courtroom. It will be somebody looking for the NDI.

10 Thank you for your close attention. This time you
11 won't hear the familiar litany about refraining from
12 discussing the matter because now the time is near at hand
13 when you must do so. Follow Mr. Flood -- oh, Mr. Flood, we
14 need to administer the oath to you.

15 (CSO sworn.)

16 THE COURT: All right. Follow Mr. Flood out. We'll
17 try to get the information in there as quickly as we can. And
18 once -- Mr. Flood, once you have brought everything in and the
19 door is closed, come and report that fact to me, please.

20 THE CSO: Yes, sir.

21 (Jury dismissed for deliberations at 2:53 p.m.)

22 THE COURT: All right. You may be seated. Let me
23 just say succinctly that this record should reflect that the
24 parties, the United States and the defendant, I think were
25 fully, fairly, and zealously represented. The case, I think,

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1225

1 was quite well litigated. Thank you.

2 The Court stands in recess. And you may -- as long
3 you're within about five minutes, and you can be reached by
4 the deputy clerk, you need not remain in the courtroom or in
5 the courthouse.

6 The Court stands in recess.

7 And I don't plan to reconvene the jury -- sometime
8 around 5:00 or 5:30, I will have Mr. Flood inquire of them how
9 long they wish to continue to deliberate and he will report
10 that to me and I'll do what's appropriate.

11 (Recess.)

12 (Jury question at 5:04 p.m.)

13 THE COURT: All right. I have a note unsigned
14 saying: "The jury in the case of USA against Kevin P. Mallory
15 will leave at 5:00 o'clock."

16 No, they won't today.

17 "We will resume deliberations at 9:00 a.m. on June
18 8, 2018."

19 Yes, they will.

20 So I'm going to call them and recess them and let
21 them go. This isn't signed. I'll make this note a part of
22 the record. I think it's Ms. O'Toole. Ms. O'Toole was the
23 lady who raised the problem about her interview on Friday.
24 She has informed Mr. Flood that that's resolved.

25 So we were safe.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1226

1 You may bring the jury in.

2 (Jury in.)

3 THE COURT: You may be seated.

4 I have a note. I think it was written by
5 Ms. O'Toole.

6 THE JUROR: It was another juror. Another juror
7 wrote it.

8 THE COURT: I beg your pardon?

9 THE JUROR: Another juror wrote it.

10 THE COURT: Yes. Well, who wrote it, then?

11 THE JUROR: I wrote it.

12 THE COURT: All right. Well, let me identify you
13 for the record.

14 THE JUROR: Sure.

15 THE COURT: No, let's -- but let me just identify --

16 THE JUROR: Mary Brienne Tierney, Juror 72.

17 THE COURT: All right. Let's just note that.

18 And you're correct, I am going to release you now.

19 You may go home. Remember to refrain from discussing the
20 matter with anyone or undertaking any investigation. Don't
21 look up anything or do anything. Put it out of your mind.
22 I'll see you tomorrow morning at 9:00 o'clock.

23 Now, all the exhibits and everything will be locked
24 up in that area.

25 THE CSO: Correct.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1227

1 THE COURT: And it'll -- we need to be clear that
2 nobody can get in that area and the shades will remain down.

3 All right. Thank you for your work today. You may
4 follow Mr. Flood out.

5 You left your menus.

6 (Jury dismissed.)

7 THE COURT: All right. You may be seated. Anything
8 else to be accomplished today?

9 MR. KAMENS: Just one issue I was going to raise,
10 and it's a very minor issue, Your Honor.

11 The classified binder has apparently two copies of
12 each of the classified documents. It has one that's shaded
13 that we discussed and one that's not shaded. And I -- I
14 thought we had talked about giving the jury the one that was
15 not shaded because the shading part was used for the witness
16 and for the lawyers. But I can't recall exactly how we
17 resolved it in terms of what was given to the jury.

18 THE COURT: All right.

19 MS. GELLIE: I do recall, Your Honor. So the
20 decision was made they would get both copies. Since they are
21 laypersons, they need to know what is classified so that once
22 dismissed from jury duty, they know which information they
23 must still hold closely and not discuss in the future.

24 So the binders currently have both versions back to
25 back behind the same tabs with a green Post-it sticky

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

1 delineating between the two versions.

2 THE COURT: All right. Mr. Kamens, I don't see a
3 problem, do you? Let it be that way?

4 MR. KAMENS: Well, not necessarily. I don't think
5 the jury was told that that's the purpose for the shading for
6 them to know what was determined to be classified.

7 THE COURT: All right. Suppose I tell them that in
8 the morning?

9 MR. KAMENS: Certainly. Or the other alternative is
10 simply to say everything in these binders -- if it was just
11 the document without the shading, just that's not something
12 that you can discuss after you leave jury service. In other
13 words, there would be a requirement that the jury would
14 distinguish between particular words in the document. It
15 seems it would be much simpler --

16 THE COURT: Well, they don't have to distinguish
17 because it's shaded. I agree with you that if there was no
18 way, other than by some verbal description, that they could do
19 it, but if it's shaded an unshaded -- was there any testimony
20 about the shading?

21 MR. KAMENS: There was, I believe so.

22 MS. GELLIE: Yes, Your Honor. And I believe Your
23 Honor did explain at the time of first handing out the binders
24 the shading had been added by the intelligence community to
25 indicate what was classified.

U.S. v. Mallory

1229

1 THE COURT: Well, I don't see any prejudice,
2 Mr. Kamens. If you can point something out to me and
3 something we should do, I'd be glad to consider it. But it
4 seems to me that we ought to just leave things alone.

5 MR. KAMENS: Understood, Your Honor.

6 MS. GELLIE: And, Your Honor, as to the classified
7 binder, I presume they're not stored in the same way after
8 hours each night.

9 THE COURT: I don't know.

10 MS. GELLIE: Okay. It should be the classified
11 binder but also the open source public documents are now also
12 considered secret, NOFORN. Thank you.

13 THE COURT: This case is such a pleasure.

14 I do think, Ms. Gellie, that at the present moment
15 those classified binders are in that locked room. I have just
16 confirmed that. Is that a problem, Ms. -- oh, Ms. Pham will
17 take them down to the SCIF.

18 MS. GELLIE: Thank you. And then Mr. Vera also
19 informed me that there's physical evidence up here as well
20 that should be locked up.

21 THE COURT: There's what?

22 MS. GELLIE: Physical evidence that also --

23 THE COURT: You mean the telephone?

24 MS. GELLIE: And the laptop has touched classified
25 as well. Only the MacBook is turning up here.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1230

1 (Discussion off the record.)

2 THE COURT: Yes, let's be clear on the record what
3 Ms. Pham is going to take to the SCIF and return before 9:00
4 o'clock tomorrow. Number 1, the two physical exhibits --

5 MS. GELLIE: There's only one currently up here,
6 Your Honor, and it's a MacBook Pro laptop.

7 THE COURT: All right. Margaret, are you aware of
8 that?

9 All right. So that one will be taken down to the
10 SCIF. Next, all of the books that contain classified
11 information, the orange covers or whatever they were, those
12 Ms. Pham will take down and put in the SCIF.

13 MS. GELLIE: Yes, Your Honor.

14 THE COURT: Third, there is some public record
15 documents that the defendant used that, because of the way in
16 which they were used, need to go into the SCIF as well?

17 MS. GELLIE: That is correct, Your Honor.

18 THE COURT: And they're in a separate binder, aren't
19 they?

20 MS. GELLIE: That is my understanding, Your Honor.

21 MR. KAMENS: That is correct, Your Honor.

22 THE COURT: All right. And, Ms. Pham, do you know
23 how to distinguish those? She does.

24 THE DEPUTY CLERK: Yes.

25 THE COURT: And anything else?

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1231

1 MS. GELLIE: That is all I'm aware of, Your Honor.

2 THE COURT: Mr. Kamens, are you aware of anything?

3 MR. KAMENS: Nothing else, Your Honor.

4 THE COURT: All right. Well, I am content to rely
5 on Ms. Pham to go and collect that material and then to
6 have -- and the jury's notebooks. And take those to the SCIF.
7 And then the room will be locked by Mr. Flood. And nobody can
8 get in without him opening it and he won't open it until 9:00
9 o'clock tomorrow morning, at which time Ms. Pham will have
10 replaced the items that we just discussed.

11 Does that make sense.

12 MS. GELLIE: It does. Thank you, Your Honor.

13 THE COURT: Mr. Kamens.

14 MR. KAMENS: Makes sense to me.

15 THE COURT: Thank you. Court stands in recess until
16 9:00 o'clock tomorrow morning.

17 MR. KAMENS: Can I ask one question? Are we going
18 to -- is the Court going to convene or --

19 THE COURT: Yes, I am going to convene.

20 MR. KAMENS: Okay.

21 THE COURT: Now, I don't have to convene, but what I
22 typically do is take the roll and tell them to go back to work
23 and tell them everything is there. Many judges don't do that.
24 And there's a good reason for that. It's technically
25 unnecessary.

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

U.S. v. Mallory

1232

1 In this case, because it's important about all this
2 classified information and everything else, I know it presents
3 a problem. Now, if you need to be somewhere else, I will be
4 happy to advise the jury that I excused you because you had a
5 conflict.

6 MR. KAMENS: I will be here, Your Honor.

7 MR. RICHMAN: It's not a concern.

8 THE COURT: All right. And you-all will be here?

9 MS. GELLIE: Yes, Your Honor.

10 THE COURT: Not a problem.

11 Thank you. Court stands in recess until 9:00
12 o'clock tomorrow morning.

13 **(Proceedings adjourned at 5:19 p.m.)**

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Tonia M. Harris OCR-USDC/EDVA 703-646-1438

CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Jury Trial in the case of the **UNITED STATES OF AMERICA versus KEVIN PATRICK MALLORY**, Criminal Action No. 1:17-CR-154, in said court on the 7th day of June, 2018.

I further certify that the foregoing 61 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this August 20, 2018.



Tonia M. Harris, RPR
Official Court Reporter